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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JEANNE A. JORDAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JEANNE A. JORDAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONSOLIDATED APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

OTIS T. BOWEN, M.D., Secretary
of Health and Human Services, DEFENDANT

[Filed Apr. 10, 1987]

ORDER

This action was initiated by the plaintiffs on September 7, 1979, to challenge the Social Security Administration's (SSA) failure to monitor individuals who act as representative payees for the receipt and disbursement of Social Security and Supplemental Security Income benefits. The plaintiffs brought various claims including a claim under the due process clause of the fifth amendment. They contended that the SSA had violated their due process rights by failing to implement an accounting system by which to determine if representative payees were carrying out their statutory duty to spend the benefits received solely for the use of the plaintiff-beneficiaries.

On March 17, 1983, this Court issued its Order rejecting the position of the defendant, Richard S. Schweiker, then Secretary of Health and Human Services (the Secretary), that the SSA had no obligation to monitor the expenditures of benefits by representative payees. *Jordan v. Schweiker*, No. CIV-79-994-W, slip op. at 17 (W.D. Okla. March 17, 1983). The Court found that "the discretionary accounting procedures . . . in effect [did] not provide due process to the social security beneficiaries for whom representative payees [had] been appointed." *Id.* The Secretary was directed to institute a mandatory periodic accounting system within one year. *Id.*

In an attempt to comply with the Court's Order of March 17, 1983, the Secretary took a random survey of only ten percent (10%) of all payees. Such action prompted the plaintiffs to file a Motion for Order Enforcing Judgment.

On March 26, 1984, the Court in ruling on the motion found that the due process rights of the plaintiff could only be protected by universal annual accountings and directed the Secertary to take "immediate steps" to implement such a system. *Jordan v. Schweiker*, No. CIV-79-994-W, slip op. at 3 (W.D. Okla. March 26, 1984). Upon subsequent motion by the Secretary, then Margaret Heckler, the Court amended its Order of March 26, 1984, to allow the SSA to monitor state institutional payees through its on-site review programs. *Jordan v. Heckler*, No. CIV-79-994-W (W.D. Okla. July 2, 1984).

On August 29, 1984, the Secretary filed a notice of appeal with the United States Court of Appeals for the Tenth Circuit from this Court's Order of March 26, 1984, as amended, July 2, 1984. Thereafter on October 16, 1984, the Secretary filed with

this Court a Motion for Indicative Ruling and Relief from Judgment under Rule 60(b)(6), F.R. Civ.P.

In the motion, the Secretary argued that recent legislation had been enacted which was contrary to this Court's Order requiring mandatory accounting of all representative payees. The legislation, the Social Security Disability Reform Act of 1984, Section 16, Pub. L. No. 98-460 (effective October 9, 1984), created a mandatory accounting system but exempted from such system the parents and spouses serving as representative payees for beneficiaries in their custody.

On January 18, 1985, the Court acknowledged that it was without jurisdiction to grant the motion but advised the parties if such a motion under Rule 60 (b) were considered by the Court it would deny the relief requested. The Court stated in part:

> "While the Court is well aware of the deference usually given Congressional actions, the fact that Congress has enacted some reforms does not change the constitutional requirements. The only way by which the Secretary can avoid the mandatory annual accounting is to establish that beneficiaries' due process rights are being adequately provided through some alternative means . . . [N]o such showing has been made for either of the two categories [spousal/parental payees and federal institutions] set out above. Beneficiaries in these two categories have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed."

Jordan v. Heckler, No. CIV-79-994-W, slip op. at 6-7 (W.D. Okla. January 18, 1985).

On January 5, 1987, the United States Court of Appeals for the Tenth Circuit found that the Secretary, then Otis R. Bowen, M.D., had abandoned the earlier appeal filed August 29, 1984, wherein this Court's Order of March 26, 1984, as amended, July 2, 1984, had been challenged and further that the Secretary had failed to file a timely notice of appeal from this Court's Order of January 18, 1985. *Jordan v. Bowen*, 808 F.2d 733, 736 (10th Cir. 1984). The appellate court dismissed the appeal without addressing the correctness of the latter Order. Now pending before the appellate court is a Petition for Rehearing and Suggestion for Rehearing En Banc and a Motion in the Alternative for Stay of Action on Rehearing Petition.

The matter now comes before this Court on the Secretary's Motion for Relief of Judgment filed pursuant to Rule 60(b)(6) wherein the Court is asked to vacate its Orders of March 17, 1983, and March 26, 1984, as amended, July 2, 1984. The plaintiffs have responded in opposition to the motion and again the parties have acknowledged that this Court is without jurisdiction to grant the instant motion. *E.g.*, *Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965). The Court can either deny the motion or, if it concludes that the motion has merit, should so advise the parties who can then request the appellate court to remand the matter so that this Court can act. *Id.*

The Court has reviewed the motion and the objections thereto of the plaintiffs and again finds that the Secretary is not entitled to the relief sought. The Court not only has engaged once in the analysis required by *Mathews v. Eldridge*, 424 U.S. 319 (1976), *see* Order of March 17, 1983, but also has

already considered the legislative provisions cited by the Secretary and the need for protecting the due process rights of those beneficiaries for whom parents or spouses have been appointed representative payees. *See* Order of March 26, 1984, as amended July 2, 1984. Thus, the Court finds it unnecessary to readdress those arguments presented by the Secretary. Accordingly, the Secretary's instant Motion for Relief of Judgment should be and is hereby DENIED.

ENTERED this 10th day of April, 1987.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV 79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

-vs-

OTIS T. BOWEN, M.D., Secretary
of Health and Human Services, DEFENDANT

[Filed May 8, 1987]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant, Otis T. Bowen, M.D., Secretary of the Department of Health and Human Services, hereby appeals to the Supreme Court of the United States from the final Order entered in this action on April 10, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

Dated this 8th day of May 1987.

Respectfully submitted,

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/s/ Roger Griffith
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Assistant U.S. Attorney

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated, PLAINTIFF

vs.

PATRICIA R. HARRIS, individually and in her official capacity as Secretary of Health and Human Services, DEFENDANT

[Filed Sep. 26, 1980]

ORDER

Background

This cause is before the Court on defendant's Motion to Dismiss for lack of jurisdiction or in the alternative to Deny Class Certification.

The plaintiff, Jeanne A. Jordan, became entitled to disability benefits under Title II of the Social Security Act in December, 1976. Although legally competent, it was determined that she was not capable of managing her benefits. Her sister, Cathy J. Culp, was therefore, designated as representative payee for Ms.

Jordan, pursuant to the Social Security Administration's procedures under § 205(j) of the Social Security Act, 42 U.S.C. § 405(j), in which the Secretary may designate a representative payee to whom the payment of benefits is made on behalf of a beneficiary.[1]

In October, 1977, upon a determination that she was no longer disabled, Ms. Jordan's benefits were terminated. As a result, Ms. Jordan alleges Ms. Culp forced her to leave her home and ceased in any way to act on Ms. Jordan's behalf. (Plaintiff's Complaint ¶¶ 23 and 24). Ms. Jordan administratively appealed the termination of her benefits and, after ten months, an administrative law judge reinstated her benefit status, effective from October 1977. However, the notice of her reinstatement, dated September 9, 1978, and the check for her past-due benefits which had accrued during the pendency of her appeal were sent to Ms. Culp, even though, plaintiff alleges, neither she nor her counsel was informed that Ms. Culp would be the payee. Plaintiff further alleges that at that time the whereabouts of the former payee were unknown to plaintiff and her attorney and that she had not even seen the payee for over one year.

On September 29, 1978, Ms. Jordan's husband, Michael A. Jordan, applied to be his wife's representative payee. On November 13, 1978, Ms. Jordan's

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[1] Title 42 § 405(j) reads:

> When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

attorney wrote the first in a series of letters requesting that the Social Security Administration reimburse Ms. Jordan for the past-due benefit check and another monthly benefit check which Ms. Jordan did not receive.

Ms. Jordan alleges that her plight was aggravated when the Secretary immediately disclaimed any further responsibility for the paid-out benefits on being informed that they had been missent. She contends that it was a year later before the Social Security Administrator communicated retrieval-of-check information to her attorney. Plaintiff alleges that there is no rehabilitative procedure applicable to her case.

Finally, plaintiff alleges that the defendant, solely for administrative convenience, has suspended the requirement that the representative payees, whom the defendant had designated, make an annual accounting of the funds received. Thus, she seeks in addition, mandatory annual accountings by payees.

Statement of Issues

Unsatisfied with the results of her attorney's correspondence with the Social Security Administration regarding her representative payee, on September 7, 1979, Ms. Jordan, as a recipient of disability-insurance benefits under Title II of the Social Security Act and in "representative payment" status, filed this civil action on behalf of herself and all others similarly situated. She alleges, *inter alia*, that the Social Security Administration's procedures pursuant to § 205(j) of the Social Security Act, 42 U.S.C. § 405(j) and the corresponding regulations 20 C.F.R. §§ 404.1601, 404.1602, 404.1609, for the representative payment of Social Security benefits, deny her and the alleged class due process of law

under the Fifth Amendment to the Constitution of the United States. In support of this allegation, she contends that the defendant Secretary of Health and Human Services has proceeded under § 205(j) of the Social Security Act to name representative payees to receive the beneficiaries' payments without any semblance of due process as to notice and hearing whereby the beneficiaries are unable to prescribe or even nominate whom the payee should be.

Accordingly, the plaintiff asks this court to take jurisdiction pursuant to 42 U.S.C. § 405(g) or 28 U.S.C. § 1361, to certify this section as a class action pursuant to Rule 23(c)(1), to declare § 405(j) and its implementing regulation unconstitutional; to enjoin the Secretary from further enforcement of § 405 (j); and to order the promulgation of new regulations.

On February 12, 1980, as a result of negotiations aimed at settling this civil action, a check in the amount of $2,356.90 was sent to Ms. Jordan as payment of benefits for the period from November 1977 through October, 1978. Ms. Jordan has refused to withdraw this law suit, however, contending that this payment has no bearing on the issues in this case.

In response to plaintiff's allegations and requests for relief, the defendant has made Motion to Dismiss and in the alternative, Motion to Deny class certification, asserting that even if plaintiff has a claim arising under the Constitution that such constitutional question must first be resolved through exhaustion of administrative remedies as dictated by 42 U.S.C. § 405(j). Defendant, in support of its motion to deny class certification, states that its action to restore payments wrongfully made to plaintiff's representative payee and subsequent actions to name an-

other representtive payee deprive plaintiff of the status of being representative of the class.

Jurisdiction

The Secretary of Health and Human Services, the defendant herein, submits that this Court lacks jurisdiction grounded on Title 28 U.S.C. § 1361, the federal mandamus statute, and contends further that subject-matter jurisdiction for judicial review of matters arising under Title II of the Social Security Act is exclusively limited to section 205(g) of the Act, 42 U.S.C. § 405(g)[2] and the limitation set forth in section 205(b) of the Act, 42 U.S.C. § 405(h).[3]

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[2] Section 405(g) provides, in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.

[3] Section 405(h) reads:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

The Secretary argues that review is not available to plaintiffs because they have not satisfied the jurisdictional prerequisites to review under § 405(g), to wit, exhaustion of remedies and receipt of a final decision.

Plaintiff, on the other hand, contends that this case is not concerned with establishing an entitlement or claim for Social Security benefits, but with a constitutional right to due process regarding a claim or entitlement that is already an established property right. Therefore, plaintiff contends exhaustion of remedies is not required. She further argues that she has met the "final decision" requirement under § 405 (g) (h) and that in any case, because her claim is a constitutional challenge, jurisdiction under Title 28 U.S.C. § 1361 is also proper.

In view of the recent decision of *Califano v. Yemaski*, —— U.S. ——, 99 S.Ct. 2545, 2553 1979, in which the Court commented on the District Courts' and the Court of Appeals' "somewhat short shrift" in failing to give due consideration to the statutory remedy in preference to "unnecessary constitutional adjudication", and in view of the holding in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 2465 (1975), that in some cases, "the Social Security Act provides jurisdiction for constitutional challenges to its provisions", this Court will analyze the statutory provisions first to determine if they are a basis for jurisdiction in this case.

Analysis of 28 U.S.C. § 405(g) as Jurisdictional Basis

Based on our interpretation of Justice Rehnquist's opinion in *Weinberger v. Salfi, supra*, and its progeny, this Court believes that the limitations the Sec-

retary attributes to 42 U.S.C. § 405(g) are not controlling in the case at bar. In *Salfi* the Court held:

> "§ 405(h) . . . extends to any "action" seeking to recover on any Social Security claim."

422 U.S. 762, 95 S.Ct. 2465.

As plaintiff has assiduously argued, however, there is no controversy here about whether the plaintiffs are entitled to recover on a Social Security claim. Thus, while *Salfi* focused on trying to recover on a Social Security claim by *establishing an entitlement*, and *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), on trying to recover Social Security claims that were being *terminated*, in the case at bar there is no issue as to any claim of entitlement arising under 42 U.S.C. § 405(g). Plaintiffs have been determined as entitled and thus they have "property" interests constitutionally protected. For the Court in *Mathews v. Eldridge* held:

> "[3] Procedural due process imposes constraints on governmental decision which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, *as has been implicit in our prior decisions*, e.g., *Richardson v. Belcher*, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed.2d 231 (1971); *Richardson v. Perales*, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427-1428, 28 L.Ed.2d 842 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372-1373, 4 L.Ed.2d 1435

> (1960), *that the interest of an individual in continued reecipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment.*" (emphasis added)

Id. at 424 U.S. 332, 333, 96 S.Ct. 901-902.

Thus, what we have at issue is, in our opinion, a purely constitutional question, a matter collateral to an entitlement a challenge to a procedure that allows the Secretary to (1) make an ex parte appointment of another to receive the benefits without so much as a by-your-leave from the recipients, and (2) a procedure that does not require the payee to give an annual accounting of the benefits that he has received on behalf of the recipient.

Despite this collateral constitutional claim, however, plaintiff argues that this court has jurisdiction under § 405(g). We do not think so. In both *Salfi* and *Eldridge, supra,* and in subsequent comments on those cases in *Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 908 (1977), the Court discussed that requisite of a "final decision" from the Secretary before invoking 405(g) jurisdiction. 430 U.S. 108-109, 97 S.Ct. 986.

The plaintiff, however, citing *Mathews v. Eldridge, supra,* argues that she has met the "final decision" requisite. *Eldridge* holds that the "final decision" is the Secretary's response to Eldridge's claim of protest to the Secretary when he was notified that his current status as a recipient was to be terminated. 422 U.S. 328-329, 96 S.Ct. 899-900. The Court said:

> "*Salfi* identfiied several conditions which must be satisfied in order to obtain judicial review under § 405(g). Of these, *the requirement* that there be a *final decision by the Secretary after*

a hearing was regarded as "*central to the requisite* grant of *subject-matter jurisdiction* . . . ." 422 U.S., at 764, 95 S.Ct. at 2466. Implicit in *Salfi*, however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the *requirement that a claim for benefits shall have been presented to the Secretary.* Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

* * * *

Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability has ceased, *he specifically presented the claim that his benefits should not be terminated because he was still disabled.* This claim was denied by the *state agency* and *its decision* was accepted by the SSA." (emphasis added)

Furthermore, the *Salfi* Court says that notwithstanding a constitutional challenge, judicial review under § 405(g)(h) requires: (1) a final decision of the Secretary made after a hearing, (2) commencement of a civil action within 60 days after the mailing of notice of such a decision, and (3) filing of the action in an appropriate district court, with only the first requirement being "central to the requisite grant of subject-matter jurisdiction." *Id.* at 422 U.S. 763-764, 95 S.Ct. 2466.

While it is true that plaintiffs' constitutional claim in *Salfi* was only "colorable", in which plaintiffs were trying to establish entitlement to social security benefits and in this case entitlement is already established, under 405(g) it appears that a "final decision" on the controversy at issue is nonetheless required, and this Court does not believe that plaintiff has met this "final decision" requirement.

Plaintiff, we think, misconstrues the term "final decision" by arguing that her claims for social security benefits and her being adjudged a qualified recipient is a "final decision" in regard to this case. While it is true that plaintiff's being declared a qualified recipient is a "final decision" by the Secretary, *that* "final decision" has no bearing on *this* controversy. Here, we think, "final decision" would have been plaintiff's protesting administratively the procedures for the Secretary's selection of a "representtaive payee," and the Secretary's decision to this response.

Therefore, we hold that this Court does not have jurisdiction under 42 U.S.C. § 402(g), but we further hold that 42 U.S.C. § 402(g) is not intended to control in this case, or if it does, it is unconstitutional and, *a fortiori*, not applicable. While Congress may, by statute, vest constitutional rights. Once vested such rights cannot be proscribed by substitute mandatory administrative procedures in place of constitutional remedies. Congress and the agencies which it creates simply lack the power to make administrative regulations superior to rights arising under the Constitution. Courts are created to decide those rights.

Furthermore, dicta in *Califano v. Sanders, supra*, says the following regarding constitutional claims:

> "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. . . . [W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence. 422 U.S. at 762, 95 S.Ct., at 2465; *Johnson v. Robinson*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974)."

430 U.S. 108, 97 S.Ct. 986.

Analysis of Title 28 U.S.C. § 1361
As Basis for Jurisdiction

This Court now examines the mandamus statute to determine if it has jurisdiction under Title 28 U.S.C. § 1361. This statute reads *in toto*:

> "§ 1361. Action to compel an officer of the United States to perform his duty
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

This statute has traditionally been used to compel compliance with due process requirements and to provide jurisdiction "to declare the due process requirements applicable to [the challenge] proceedings." *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977). See also, *Ryan v. Shea*, 525 F.2d

268, 271-272 (10th Cir. 1975); *Knuckles v. Weinberger*, 511 F.2d 1221 (9th Cir. 1975).

In *Ryan v. Shea, supra*, the Tenth Circuit said of *Salfi* and 28 U.S.C. § 1361:

> ". . . In the instant case we are not concerned with the denial of a claim as such, but with the determination by the Secretary to terminate disability benefits in an allegedly unconstitutional manner, i.e., without notice and hearing. ". . . In sum, *Salfi* does not apply and 42 U.S.C. § 405(g) is certainly not in our view the exclusive way to tackle the precise problem here sought to be raised.
>
> "We therefore conclude that the trial court had jurisdiction to entertain the present proceeding under 28 U.S.C. § 1361."

Id. at 272.

Regarding the mandamus statute, the Ninth Circuit in *Elliott v. Weinberger*, 564 F.2d 1219, 1227 (1977), commented:

> "[No] clear and convincing evidence exist[s] that Congress intended to limit mandamus jurisdiction at all by § 405(h). Section 1361 did not exist when § 405(h) was enacted in 1935 precluding jurisdiction under section 41 of Title 28 for recovery of Social Security claims. In at least one other instance where Congress intended a statutory limitation to encompass § 1361, a specific amendment to the limiting statute was made."

The Court further comments at 1227, note 12:

> "When § 405(h) was enacted in 1935, section 41 of Title 28 contained all of that title's grants

of jurisdiction to district courts, including § 1331's predecessor. *See*, 28 U.S.C. § 41(1) (1940). It did not contain any grant to federal courts to entertain actions in the nature of mandamus. It was not until 1962 when Congress, in enacting § 1361, extended to all federal courts jurisdiction to hear suits seeking mandamus relief—such jurisdiction prior thereto reposed only in the federal courts of the District of Columbia. Thus, § 1361 actions cannot be considered precluded under § 405(h) simply because § 1361 did not exist when § 405(h) was enacted. One might argue that Congress intended all further additions to Title 28's grants of jurisdiction to be, by the mere statutory location of those additions, subsumed within the proscription of § 405(h). However, no such congressional intent is anywhere evidenced."

Therefore, the Court holds under the above authority that 28 U.S.C. § 1361 is the jurisdictional basis for its hearing this case in which recipients of Social Security benefits (1) challenge the Secretary's appointment of representative payees to receive their Social Security benefits without giving them adequate notice and a meaningful opportunity for a prior hearing on the initial selection of an individual as a representative payee (or continuation of an individual as a representative payee when a beneficiary's benefits have been interrupted), and (2) seek to enforce what they claim is a constitutional right to a mandatory and annual accounting by payees.

Class Certification

Pursuant to the Federal Rules of Civil Procedure, Rule 23(c)(1), (a), and (b)(2) and *Rex v. Owens*

ex rel. State of Oklahoma, 585 F.2d 432, 435 (10th Cir. 1978), this Court certifies Jeanne A. Jordan, as representative of the class, and as a class all recipients and Social Security benefits (Title II of the Social Security Act, as amended) and Supplemental Security Income (Title XVI of the Act) who now have or have had a representative payee within six years prior to the filing of this action. The class does not include the following persons:

(1) Those who are named plaintiff or are members of a plaintiff class in pending actions against the Secretary which raise similar issues in other districts.

(2) Those who have participated as plaintiffs or members of a plaintiff class in litigation against the Secretary on similar issues, if a decision on the merits has been rendered.

Inasmuch as we hold that this Court's jurisdiction is grounded on Title 28 U.S.C. § 1361 and not on 42 U.S.C.§ 405(g), this Court need not consider the objections the Secretary raises under § 405(g).

Regarding the Secretary's allegation that the claim of the named plaintiff is not typical of the claims alleged on behalf of the class, we disagree. All qualified recipients of Social Security benefits which Ms. Jordan wants to include in the class, can claim the same deprivation of constitutional rights alleged by Ms. Jordan: (1) denial of due process caused by the lack of provision for prior hearings in the selection process of a representative payee, (2) denial of due process from a lack of hearing in the event of interruption and reinstatement of benefits before automatically continuing the representative payee in that status, and (3) denial of due process because of the

lack of a mandatory annual accounting requirement in the representative payment program.

Thus, we do not see that the legal competence or incompetence of a Social Security beneficiary is controlling inasmuch as a recipient, even if incompetent, still has constitutional rights, and the same is true of minors and institutionalized people. *Vecchione v. Wohlgemath*, 377 F.Supp. 1361, *aff'd*, 558 F.2d 150, *cert denied, Beal v. Vecchione*, 434 U.S. 943, 98 S.Ct. 439, 54 L.Ed.2d 304 (1974).

Finally, this Court does not agree that because the Secretary has, after months have passed, made restitution to Ms. Jordan, that as to her the case is moot. That argument belies the obvious; that is, that Ms. Jordan is still subject to the same alleged malfeasance. Restitution in no way reduced the risk of further injury since the same procedures that allowed the first injury are still in full force and effect. *See, Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911), for the principle that the case will not be moot if the issue is capable of repetition, yet evading review. This principle was followed in *Rex v. Owens, supra.*

WHEREOF, defendant's Motions to Dismiss and to Deny Class Certification are denied. This Court takes jurisdiction and certifies this case as a class-action suit.

IT IS SO ORDERED this 25th day of September, 1980.

/s/ Lee R. West
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, DEFENDANTS

[Filed Mar. 17, 1983]

ORDER

This matter comes before the Court upon the Motion for Summary Judgment, or Alternatively, to Dismiss of the defendant and the Cross-Motion for Summary Judgment of the plaintiffs. Defendant filed a Reply Brief and plaintiffs filed a Supplemental Memorandum in Support of Cross-Motion for Summary Judgment. Oral argument on these cross-motions was held March 2, 1983.

Plaintiff Jeanne A. Jordan became entitled to disability insurance benefits under Title II of the Social Security Act in December 1976. Although legally competent, it was determined that she was not capable of managing her benefits. Her sister, Cathy J. Culp,

was therefore designated as representative payee for Ms. Jordan.

In October 1977, upon a determination that she was no longer disabled, Ms. Jordan's disability benefits were terminated. As a result, Ms. Jordan alleges, Ms. Culp forced her to leave her home and ceased in any way to act on Ms. Jordan's behalf. Ms. Jordan administratively appealed the termination of her benefits and after a hearing before an administrative law judge her benefit status was reinstated effective from October 1977. However, the notice of her reinstatement, dated September 9, 1978, and the check for her past-due benefits which had accrued during the pendency of her appeal, were sent to Ms. Culp.

On September 29, 1978, Ms. Jordan's husband, Michael A. Jordan, applied to be her representative payee. On November 13, 1978, Mr. Jordan was designated as representative payee for his wife and began receiving monthly benefits on her behalf.

Plaintiff filed her Complaint on September 7, 1979. On February 12, 1980, a check in the amount of $2,356.90 was sent to Ms. Jordan as payment of benefits for the period from November 1977 through October 1978.

On September 26, 1980, this Court took jurisdiction and certified this case as a class-action suit. On April 5, 1982, this Court granted plaintiffs' Motion to Intervene Barbara Leeds.

Maude Miller, on February 11, 1977, was recommended by the Social Security Administration (SSA) to be made representative payee on behalf of Barbara Leeds. Barbara Leeds agreed to the appointment of Maude Miller as her representative payee. However, on April 27, 1977, Barbara Leeds requested that payments be made directly to herself.

On June 6, 1977, Maude Miller was directed to make an accounting of how benefits received on behalf of Barbara Leeds from June 1974 through May 1977 were used. On December 27, 1978, Barbara Leeds alleged misuse of funds by Maude Miller. SSA found no misuse. Barbara Leeds requested a reconsideration of this finding. On January 10, 1980, SSA found, after a review of the case that its "previous decision, that misuse is not an issue, was correct."

Defendant contends that procedures for the representative payment of social security benefits do not violate a beneficiary's right to due process of law; that due process does not require mandatory periodic accounting by representative payees; and that this case should be dismissed for lack of jurisdiction.

Plaintiff contends that under either 42 U.S.C. § 405 (j) or the Due Process Clause of the Fifth Amendment the Secretary of Health and Human Services is required to provide the opportunity for an oral hearing prior to the initial selection or continuation of a payee; that mandatory periodic accountings are required by the provisions of the Social Security Act allowing for representative payment and due process; and that full administrative and judicial review of claims of misuse is required by the Due Process Clause and by statute.

On a motion for summary judgment, this Court must construe the facts in a way most favorable to the nonmovant. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another. *See S.E.C. v. American Commodity Exchange, Inc.*, 545 F.2d 1361 (10th Cir. 1976). The existence of any "genuine issue as to any material fact precludes the grant of

summary judgment." Rule 56, Fed.R.Civ.P. This Court does not find that any genuine issue of material fact exists, therefore summary judgment is appropriate.

Jurisdiction

Defendant contends that this case should be dismissed for lack of jurisdiction. In its Order of September 26, 1980, this Court dealt with defendant's claim of lack of jurisdiction and found that this Court has jurisdiction under 28 U.S.C. § 1361. Accordingly, defendant's Motion for Summary Judgment based upon its claim of lack of jurisdiction should be and is hereby DENIED.

Oral Hearing Prior to the Initial Selection or Continuation of a Payee

The defendant states that the Secretary's authority to appoint a representative payee for social security benefits is set forth in section 405(j) of the Social Security Act, 42 U.S.C. § 405(j). The Secretary has implemented the mandate of section 405(j) through 20 C.F.R. §§ 404.1601-1610 and §§ 416.601-690 and Part 02 of the Social Security Administration's Program Operation Manual System.

Under these procedures, prior to a determination that a beneficiary is in need of a representative payee and prior to the selection of a payee, the SSA provides all adult beneficiaries who have not been adjudged legally incompetent with advance notice of the proposed determinations. POMS GN 00502.240. The advance notice provides the beneficiary with the opportunity to object to the proposed determinations before they are formalized and to submit additional information. The advance notice states that if no notice protest is received within ten days, the pro-

posed action will be processed. POMS GN 00502.-300B.

If a beneficiary protests the proposed determination, considerable weight is given to the protest. In such cases, direct payment continues unless convincing evidence clearly establishes that the beneficiary is not able to handle his or her own funds. POMS GN 00502.260. Where no protest is received, or there is sufficient evidence to appoint a representative payee in spite of a protest, the payee is processed and the beneficiary is sent a formal notice of the determination which provides information regarding his or her right to appeal. POMS GN 00504.285A. Thus, for an adult beneficiary not adjudged legally incompetent, there is advance notice of both the determination of need for representative payee status and the determination of who the representative payee will be. Both the "need" and the "who" determinations are "initial" determinations subject to full administrative appeal and judicial review. 20 C.F.R. § 404.905(n).

For adult beneficiaries who have been adjudged legally incompetent the procedures are slightly different. In such cases the determination regarding the "need" to appoint a representative payee is not an initial determination and is, therefore, not subject to the administrative appeal process. The determination regarding "who" will be appointed representative payee is, however, an initial determination and is, therefore, subject to full advance notice and post-determination appeal procedures. 20 C.F.R. § 404.905(n). Where the legal representative of the adjudged incompetent beneficiary is not the proposed payee, an advance notice of proposed payee selection is provided the legal representative. The advance notice gives the legal representative an opportunity

to object to the proposed payee selection before it is formalized and to submit additional information. The advance notice states that if no protest is received within ten days, the proposed action will be processed. POMS GN 00502.245, 00502.300C. Where no protest is received, or where there is sufficient evidence to appoint a particular payee in spite of a protest, the payee action is processed and the legal guardian is sent a formal notice of the determination which provides information regarding the right to appeal the determination. POMS GN 00504.285B.

The defendant claims that the SSA goes to great length to find a representative payee who is genuinely interested in the welfare of the beneficiary. POMS GN 00502. The relationship of the potential payee with the beneficiary is evaluated. Preference is given to a legal guardian, spouse, relative, friend or lastly an institution. POMS GN 00502.130.

The defendant contends that in order to monitor the impact of these procedures SSA listed all initial and post-entitlement rep payee determinations between January 1977 and June 1979. Of over 52,000 rep payee determinations on initial claims, less than 2% of the beneficiaries protested the proposed determination. Of those protests, SSA's determination was split evenly in sustaining the protest or making the determination in spite of the protest. In over 287,000 post-entitlement rep payee determinations only 4.4% of the affected beneficiaries protested. SSA's determinations upon protest were evenly split with a 2.3% of the protests honored and 2.1% of the proposed determinations made in spite of the protest.

Defendant further contends that requiring a hearing before the selection of a rep payee would create a hardship for the beneficiary. Pursuant to 20 C.F.R.

404.95(n) the rep payee selection determination is an "initial determination" subject to the Secretary's four-step administrative appeal and ultimate judicial review pursuant to 405(g) of the Act, 42 U.S.C. 405(g). Defendant contends that it is more sensible for SSA to certify payment of benefits to its choice as payee rather than to have certification of payment of benefits delayed awaiting the outcome of an adversary hearing to settle a dispute over a rep payee selection.

Defendant, therefore, contends that neither the Social Security Act nor the Due Process Clause of the Fifth Amendment requires the opportunity for an oral hearing prior to the selection of a representative payee.

Plaintiffs contend that the Secretary's policy of limiting an "incapable" beneficiary to written objections does not adequately protect the beneficiary from appointment of an incompetent or untrustworthy payee absent a prior hearing. Plaintiffs further contend that in evaluating a payee-applicant's "concern for a beneficiary's best interest" the Secretary must assess the state of mind hence, credibility) of the payee-applicant which requires an oral "face-to-face" meeting. Therefore, plaintiffs contend that both 42 U.S.C. § 405(j) and the Due Process Clause of the Fifth Amendment require that the Secretary provide adequate notice and a meaningful opportunity for a prior hearing concerning the initial selection or continuation of an individual as payee.

The United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, stated that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that

> will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

This Court concludes that application of the factors in *Mathews v. Eldridge* to the facts in this case is necessary.

This Court agrees with plaintiffs that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial.

This Court does not agree with plaintiffs' contentions that the risk of error under the Secretary's procedures is great and the value of an oral hearing prior to selection or continuation of a payee is substantial. In *Tidwell, et al. v. Califano, et al.*, Nos. 73-C-3014 and 74-C-183 (N.D. Ill., March 5, 1979), plaintiffs filed suit on behalf of all individuals who had been or were at that time patients in Illinois state mental hospitals. The panel addressed the issues of whether or not "due process requires an initial determination at the Incompetency Need Stage and whether due process requires more than the 'panoply of administrative and judicial review rights' which are provided by the initial determination where it is required." The *Tidwell* court initially found the Secretary's old (prior to 1976) representative payee procedures were in violation of the Fifth Amendment and so ruled. *Tidwell, et al. v. Weinberger*, Nos. 73-C-3014 and 74-C-183 (N.D. Ill., June 23, 1976). Subsequently, the Secretary's current pro-

cedures were implemented and considered by the *Tidwell* court which stated at p. 8-9:

> In our Order we indicated that *Mathews v. Eldridge*, 424 U.S. 319 (1976), addresses the issue of whether procedures prior to and during the selection of a representative payee meet due process standards. In weighing the different factors then under consideration and juxtaposing our findings against the *Eldridge* criteria, we held that "the administrative procedures in the present case obviously lack any procedural safeguards." (Order, p. 17). We also found, however, that, although need stage hearings would provide the greatest safeguards, they were not constitutionally required. (Order, p. 16).
>
> It was in the context of these findings that we set forth the criteria, heretofore mentioned, that must be followed during a determination to appoint a representative payee. We have examined the revised regulations, and now find that they satisfy our criteria and therefore comport with due process requirements.*

In *Fulk, et al. v. Moritz, et al.*, No. C74-230 (N.D. Ohio, September 28, 1981) plaintiffs were individuals who were committed for rehabilitative treatment to institutions under control of the Ohio Department of Mental Health and Mental Retardation. A three-judge panel addressed the issue of whether or not federal defendants provided the plaintiffs with procedural safeguards when designating representa-

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* That part of the decision relied upon by this Court was not appealed by State of Illinois to the United States Court of Appeals, Seventh Circuit, in *Tidwell v. Schweiker*, 677 F.2d 560, 564 (7th Cir. 1982).

tive payees for benefits to which plaintiffs are entitled under federal law. The court at page 5 stated that

> [i]t is clear today that at the very least the matter of who shall be named as a designated payee requires full notice and hearing, and is appealable, by proper procedural steps, to the United States Courts.
>
> Originally, a three-judge court of the Northern District of Illinois found, in the case of *Tidwell, et al. v. Weinberger*, Nos. 73-6-3014 and 74-6-183 (June 23, 1976), that the earlier provisions did not comport with due process. However, upon a later motion by the defendant in these cases to alter or amend the judgment, that Court held that it had examined the revised regulations and found that they comport with due process.
>
> This Court agrees with the conclusions of the *Tidwell* court. Even if this Court had jurisdiction to determine the issue, it would find that the plaintiffs' substantive claims are without merit, and this action should be dismissed.

In *McGrath v. Weinberger*, 541 F.2d 249, 254 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977), the action was brought by two social security recipients to challenge the constitutionality of the SSA procedure whereby a recipient may be determined to be incapable of managing his monetary benefits and a representative payee appointed. The Court held that "the Due Process Clause does not demand that prior notice and an opportunity for a hearing be afforded Social Security beneficiaries who are determined to be incapable of managing their own benefits." Finally, in *Mathews v. Eldridge*, *supra*, respondent

brought the action challenging the constitutionality of the procedures for terminating disability benefits. The Supreme Court held at page 321 that "an evidentiary hearing is not required prior to the termination of Social Security disability payments and the administrative procedures prescribed under the Act fully comport with due process."

This Court concludes that neither 42 U.S.C. § 405(j) nor the Due Process Clause of the Fifth Amendment requires the Secretary to provide the opportunity for an oral hearing prior to the initial selection or continuation of a representative payee. Given the procedures in effect for the determination that a beneficiary is in need of a representative payee and for the selection of a representative payee, this Court finds that the risk that a representative payee will be appointed who will not care for the welfare of the beneficiary is slight and the provision for an oral hearing prior to the selection of a payee will not significantly reduce the risk of possible error. The procedures provided sufficiently protect a beneficiary's right to due process and further are in balance with the Government's fiscal and administrative burden. While this Court is sympathetic to plaintiffs' claims, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra*, at page 344. Accordingly, this Court finds that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of an oral hearing prior to the initial selection or continuation of a payee should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED.

Mandatory Periodic Accountings

The defendant contends that due process does not require mandatory periodic accountings by representative payees. Defendant states that there are more than 5 million social security beneficiaries in need of representative payment and for whom a payee has been selected and that an enormous fiscal and administrative burden would be created if each payee were required to file periodic accounts with the Social Security Administration. In addition, defendant claims that misuse in the rep payee program is limited to .5% of the cases. Defendant contends that the comprehensive procedures for the determination of need for representative payment and selection of a payee in conjunction with discretionary accounting provide adequate protection for the beneficiaries' property interest without creating an oppressive fiscal burden.

Defendant also contends that 42 U.S.C. § 405(j) does not vest beneficiaries with a right to "receipt and proper expenditure" of their benefits. Defendant cites *Watson v. Califano*, 487 F.Supp. 179, 186 S.D. N.Y. 1979), *aff'd*, 622 F.2d 577 (2nd Cir. 1980). In *Watson* minor children of a disabled worker sued the Secretary of Health, Education and Welfare to recover disability benefits paid for their benefit to their father as their representative payee. The court stated

> Because section 405(j) does not require any ongoing supervision or representative payees, and because section 405(a) gives the Secretary full power to promulgate any regulations which are necessary or appropriate to carry out that subchapter, "a court has quite literally no indicia by which it may evaluate that exercise (of dis-

cretion) and hence no power of review under § 701(a)(2)." *Greater New York Hospital Ass'n v. Mathews*, *supra*, at 498.

If the Secretary's actions were subject to review, the failure over a five year period to ensure that the benefits would be used for the beneficiaries would be found inexcusable. The language of the regulations and the suspended portions of the Social Security Claims Manual indicates that the Social Security Administration was keenly aware of the need to supervise representative payees in order to protect beneficiaries. In addition, the requirement of some type of annual accounting would not have been an undue burden on the Administration, but would have been borne by the representative payee required to prepare the submission. Even if the Administration lacked the resources to review the submission, or to verify them every third year as provided by the Manual, the mere threat of review and potential federal prosecution may have been enough to induce Mr. Watson to use the money for the benefit of his children.

* * * *

The situation here is a very unfortunate one, but one for which there is no remedy for the plaintiffs. Absent a broader jurisdictional grant and a more stringent Congressional mandate, the court is unable to impose upon the Secretary duties and responsibilities beyond those required in the statute.

Plaintiffs in *Watson* asserted that the jurisdiction of the court was based on 42 U.S.C. § 405(g), see page 182. Apparently, the court was not presented with a due process claim concerning the need for manda-

tory periodic accounting nor was *Watson* a class-action suit.

Plaintiffs contend that by definition, an individual who has been determined correctly to need a representative payee is not capable of monitoring or supervising the payee. Plaintiffs state that although defendant maintains that its preliminary study shows the rate of misuse of funds by payees to be only .5%, defendant also contends that an additional 1.3% of payees in the small preliminary sample were guilty of "improper" use, 20% of payees performed in a manner less than satisfactory, 7.4% of the cases examined warranted a change of payee, 6.1% of the payees kept inadequate records and another 17.9% of the payees had at least minor inconsistencies in their records. Plaintiffs state that their arguments do not depend on a contention that the majority of payees misuse funds; rather, plaintiffs contend that the risk of misuse or of other improper use is real, significant, and inherent in any representative payment system and that a recognition of such risk must enter into any analysis of the proper conduct of the representative payment program.

Plaintiffs further contend that using defendant's figures that the $9.7 million cash value of the 489 work-years saved by eliminating accounting and verification from the representative payee workload in 1979 divided by the 4,460,123 Social Security and S.S.I. beneficiaries who had representative payees resulted in a savings of $2.17 per beneficiary in payee status. Plaintiffs claim that not only is $2.17 a small fraction of each beneficiary's annual entitlement but that accounting will negate much of the cost incurred from payouts to representative payees not performing their duties satisfactorily.

Applying the factors in *Mathews v. Eldridge*, *supra*, this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. This Court also finds that the risk of an erroneous deprivation of this interest through the procedures used is great and the probable value of mandatory accounting is substantial. This Court also finds that the fiscal and administrative burdens that mandatory accounting would entail would not be great.

In this class-action suit this Court has been presented with a due process claim concerning the need for mandatory periodic accounting. This Court concludes that the discretionary accounting procedures now in effect do not provide due process to the social security beneficiaries for whom representative payees have been appointed. Accordingly, defendant's Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby DENIED. Plaintiffs' Cross-Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby GRANTED. Defendant is directed to implement appropriate mandatory periodic accounting procedures within one year from the date of this Order.

Administrative and Judicial Review of Claims of Misuse

Defendant contends that neither the Social Security Act nor the Fifth Amendment requires administrative and judicial review of a claim of misuse made by a beneficiary against his representative payee. Defendant contends that the Social Security Act makes it clear that the payment of benefits pursuant to section 405(j) is "a complete settlement and

satisfaction of any claim, right, or interest in and to such payment." Section 405(k) of the Act, 42 U.S.C. 405(k). No due process violation exists due to failure of the Secretary to provide administrative and judicial review of a determination on a misuse claim because the claimant is deprived of nothing. Accordingly, defendant contends, the Secretary is not liable to the beneficiary for misuse by the rep payee of the beneficiary's funds; rather, if in fact a rep payee has converted funds of the beneficiary, the beneficiary can seek redress in state courts.

Plaintiffs contend that when an individual who has discovered that his or her representative payee misused benefits files a complaint of misuse with the Secretary, the Secretary's decision concerning misuse of benefits is, as a practical matter, dispositive of whether that individual will obtain redress of misuse of benefits or remain permanently deprived of all or part of the benefits to which he or she is entitled. If the SSA finds that misuse has occurred, its policy is to set in force various mechanisms in order to obtain redress for the beneficiary. Plaintiffs further contend that the Secretary's refusal to provide a hearing on a decision concerning misuse of benefits is that if a decision of "no misuse" is made the mechanisms available to the SSA for redress of misuse will not be triggered and the beneficiary will have no further practical remedy.

Applying the factors in *Mathews v. Eldridge*, *supra*, this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. However, this Court finds that the risk of an erroneous deprivation of this interest through the procedures used is small and the probable value of administrative and judicial review

of claims of misuse is not substantial. Additionally, the fiscal and administrative burdens that administrative and judicial review of claims of misuse would entail would be great. Accordingly, this Court finds that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of administrative and judicial review of claims of misuse should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED.

In summary, after a review of the contentions of the parties individually and as a whole to determine the "multiple effect", this Court finds that the defendant's Motion for Summary Judgment based upon its claim of lack of jurisdiction should be and is hereby DENIED; that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of an oral hearing prior to the initial selection or continuation of a payee should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED with respect to this issue; that the defendant's Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby DENIED and plaintiffs' Cross-Motion for Summary Judgment with respect to the provision for mandatory periodic accounting, should be and is hereby GRANTED; and that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of administrative and judicial review of claims of misuse should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED as it pertains to administrative and judicial review of claims of misuse. Defendant is directed to comply with this Order with respect to the provision for man-

datory periodic accounting within one year from the date of this Order.

IT IS SO ORDERED this 17th day of March, 1983.

/s/ Lee R. West
LEE R. WEST
United States District Judge
Entered In Judgment Docket
on 3-11-83

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, DEFENDANT

[Filed Mar. 26, 1984]

ORDER

This matter comes before the Court upon plaintiffs' Motion for Order Enforcing Judgment. The parties submitted written memoranda and presented oral arguments on March 20, 1984.

On March 17, 1983, this Court directed the defendants to implement appropriate mandatory accounting procedures within one year in order to provide due process to social security beneficiaries for whom representative payees have been appointed. A judgment was entered and the defendants appealed from that judgment. Thereafter, defendant requested that the appeal be dismissed and the Court of Appeals granted the request.

The Social Security Administration (SSA) formulated a plan which it contends complies with the

requirements of this Court's Order. The plaintiffs allege that the proposed plan does not comport with this Court's mandate. Briefly stated, SSA's proposed plan requires that a form be sent to a random sample of ten percent payee repersentatives. After the forms are returned to SSA, they would be evaluated and if the answers provided by the representatives raised any questions, personal contact would be made and an additional form filled out.

Plaintiffs object to the proposed plan contending that it is inadequate. According to the plaintiffs, the form to be sent to the selected representative payees (Form SSA-623) does not require the representative payee to account for expenditures of social security benefits. Plaintiffs further argue that all representative payees should be required to complete an accounting form annually. Lastly, the plaintiffs contend that the Secretary's procedure for the review of accountings is inadequate.

The defendant contends that the proposed plan is both effective and efficient. According to the defendant, Form SSA-623 is an initial form designed to be an indicator of representative payee performance and not a final accounting statement. The defendant further contends that having a random sample of representative payees complete Form SSA-623 is adequate because SSA could not annually review accounting forms from all representative payees. Requiring only 10 percent of the representative payees to complete Form SSA-623 lessens needless paperwork for both SSA and the representative payees. The defendant also contends that the procedure for review of representative payee accounting forms is adequate.

After considering the written submissions by the parties and the oral arguments of counsel, the Court

is persuaded that the substantial interest of Social Security beneficiaries for whom representative payees have been appointed can only be adequately protected by requiring universal annual accountings. The Court is not convinced, however, that the Form SSA-623 adopted by the defendant is inadequate as an initial indicator of payee performance. The Court is mindful of the limited information which may be gleaned from this form, but the SSA-623 appears to be an acceptable compromise between ease in understanding and interpretation for the representative payees on one hand, and the need for adequate safeguards on the other. Additionally, a more complete accounting on Form SSA-624 will be required when answers on SSA-623 indicate there is such a need.

At this time, it appears that the defendant's proposals for verifying information on Form SSA-623 is adequate, and the Court is not disposed to set a minimum number of forms which must be verified. The Court assumes, of course, that the defendants will verify a reasonable number of forms in order to protect the social security beneficiaries' interest.

Accordingly, it is the order of this Court that the defendant take immediate steps to provide all representative payees with SSA-623 forms and ensure the completion and return of those forms. The defendant is further ordered to implement or maintain reasonable methods of verifying information submitted by representative payees.

IT IS SO ORDERED this 26th day of March, 1984.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

MARGARET HECKLER, Secretary
of Health and Human Services, DEFENDANTS

[Filed July 2, 1984]

ORDER

This matter comes before the Court upon Motion to Amend by the defendant, the Secretary of Health and Human Services. The plaintiffs have responded in opposition to this motion.

By Order dated March 26, 1984, this Court ruled that the Secretary's proposed accounting program was inadequate to comply with the Court's summary judgment ruling of March 17, 1983. The Court determined that in order to protect all beneficiaries for whom SSA has selected representative payees, all such payees must be required to annually report to the Secretary. The Secretary's proposal form SSA-623 was found to be an adequate initial indica-

tor of the propriety of the expenditure of the beneficiary's Social Security funds.

In her motion to amend, the Secretary has requested that the required universal accounting be waived for those beneficiaries who are institutionalized in the State facilities for the mentally ill and mentally retarded for whom the State institutions act as representative payee. As an alternative to the annual completion of form SSA-623 for these beneficiaries, the Secretary proposes the performance of on-site inspections at these institutions. The on-site review program was instituted in 1970 to monitor the performance of State institutions as representative payees. These inspections include interviews with staff members, review of the institution's expenditures and review of the institution's records for individual beneficiaries. The Social Security Administration has implemented some changes in the existing structure for conducting these on-site reviews. The program proposed by the Secretary (the Boston pilot program) significantly reduces the amount of time the Social Security Administration staff members spend at the institution and also abolishes interviews with the beneficiaries. On the other hand, the results of the inspection are made immediately available to the institution's administration instead of the lengthy delay under the old program. These on-site inspections are to be conducted at least once every three years.

The Secretary suggests that the revised on-site review program provides meaningful information regarding the expenditure of funds for these institutionalized beneficiaries. According to the Secretary, the needs of beneficiaries confined to institutions are distinct from those of other beneficiaries and are bet-

ter addressed by a program specifically designed for them.

In opposition to this motion, plaintiffs argue that although an on-site review program might be an acceptable method of protecting institutionalized beneficiaries, the program proposed by the Secretary is inadequate. In particular, plaintiffs object to the discontinuation of interviews with individual beneficiaries and the lack of a requirement that each institution be visited only once every three years. Plantiffs contend that the institutions should be required to complete form SSA-623 for all patients. According to plaintiffs, the institutions already maintain all information for completing the form so the additional burden on the institution would be slight. Additionally, plaintiffs contend that reviewing these forms along with the institution's individual patient accounts would provide adequate protection for the institutionalized beneficiary.

The Court is persuaded that the distinct needs of beneficiaries who are mentally ill or retarded and institutionalized in state or federal institutions and for whom the institution is the representative payee, can be better met by an on-site program than by the completion of form SSA-623. In order to adequately protect the needs of institutionalized beneficiaries, each institution acting as a representative payee must be the subject of an on-site review at least once every three years. The outline of the review conducted in the Boston pilot program appears to be adequate to protect the interests of these beneficiaries. The immediate communication of the results of the review to the institution's staff is particularly desirable.

While the Court is somewhat concerned by the frequency of the on-site reviews and their duration,

it is also apparent that these reviews are not the only evaluations of institutional performance which are conducted. In addition to the on-site inspections by reviewing teams, the district Social Security offices monitor the institution's performance as a representative payee. State mental health agencies also review the performance of institutions in providing care to the beneficiaries. The highly regulated nature of these institutions makes institutional misappropriation of funds less likely than in the case of individual representative payees.

Accordingly, it is the order of this Court that due to the distinct posture of beneficiaries institutionalized in state and federal facilities for the mentally ill and mentally retarded, the Secretary need not require the completion of form SSA-623 by institutions acting as payee representatives for those institutions. In lieu of this annual accounting procedure, the Secretary will perform on-site inspections at each of these institutions at least once every three years, as well as providing continual monitoring by district social security offices.

IT IS SO ORDERED this 2nd day of July, 1984.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

MARGARET HECKLER, Secretary
of Health and Human Services, DEFENDANT

[Filed Jan. 18, 1985]

ORDER

This matter comes before the Court upon defendant's Motion For An Indicative Ruling and For Relief From Judgment. This case is currently pending before the United States Court of Appeals for the Tenth Circuit, therefore this Court is without jurisdiction to rule on a motion for relief from judgment pursuant to Rule 60(b). The Court will, however, grant defendant's motion for an indicative ruling and advise the parties that were such a motion presented, it would be denied.

Factual Background

Only a brief narration of the facts of this lengthy case is necessary in order to dispose of this motion.

On March 17, 1983, this Court entered an order finding, *inter alia*, that the due process clause of the Fifth Amendment required that the Social Security Administration implement mandatory, periodic accounting procedures:

> Applying the factors in *Mathews v. Eldridge*, *supra*, this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. This Court also finds that the risk of an erroneous deprivation of this interest through the procedures used is great and the probable value of mandatory accounting is substantial. This Court also finds that the fiscal and administrative burdens that mandatory accounting would entail would not be great.
>
> In this class-action suit this Court has been presented with a due process claim concerning the need for mandatory periodic accounting. This Court concludes that the discretionary accounting procedures now in effect do not provide due process to the social security beneficiaries for whom representative payees have been appointed.

Order, March 17, 1983.

On March 26, 1984, this case was once more before the Court.[1] At that time the Court was asked to determine whether defendant's plan to submit an accounting form to only ten percent of payee representatives was adequate to comply with the Court's

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[1] Notice of appeal of the Court's March 26, 1984, order was filed by defendant on August 29, 1984. It is this appeal which is currently pending before the United States Court of Appeals for the Tenth Circuit.

order. The Court found that the substantial interest of Social Security beneficiaries for whom representative payees have been appointed could be adequately protected only by requiring universal annual accountings.

The Secretary thereafter requested that the Court amend its March 26, 1984, order so as to exempt from the mandatory annual accountings State institutions which act as representative payees for beneficiaries who are institutionalized in State facilities. The Court did allow the Secretary to waive the filing requirements of these representative payees. However, the Court made it clear that its decision to waive the annual accounting by these institutions was due to the careful scrutiny these representative payees receive from other sources:

> While the Court is somewhat concerned by the frequency of the on-site reviews and their duration, it is also apparent that these reviews are not the only evaluations of institutional performance which are conducted. In addition to the on-site inspections by reviewing teams, the district Social Security offices monitor the institution's performance as a representative payee. State mental health agencies also review the performance of institutions in providing care to the beneficiaries. The highly regulated nature of these institutions makes institutional misappropriation of funds less likely than in the case of individual representative payees.

Contentions of the Parties

In her motion, the Secretary argues that the Court should indicate its willingness to grant a motion for relief from judgment or order pursuant to Rule

60(b), Fed. R. Civ. P. In support of her argument, the Secretary relies on Rule 60(b)(6):

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

Rule 60(b)(6), Fed. R. Civ. P. Defendant argues that she is entitled to such relief due to the enactment of Public Law No. 98-460. According to the Secretary, that statute conflicts with the Court's order requiring mandatory annual accounting and the order should, therefore, be amended to comply with the statute.

In response plaintiffs argue that the Court has already determined that mandatory periodic accounting is required by the due process clause of the Fifth Amendment. According to plaintiffs, this constitutional requirement establishes a minimal requirement of payee accountability which was not abrogated by the enactment of Public Law No. 98-460.

Indicative Ruling

Normally, the filing of a notice of appeal deprives the trial court of jurisdiction. The trial court does, however, retain jurisdiction to consider how it would rule on a Rule 60(b) motion. *Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965). If the Court indicates that it will grant the motion the movant may then ask the Court of Appeals to remand the case, thus avoiding the necessity of a ruling on the appeal. *Id.* In order to expedite this already old case, the Court will grant defendant's motion for an indicative ruling.

The Court must, however, agree with plaintiffs' argument that defendant is not entitled to relief from judgment.

The Social Security Disability Benefits Reform Act of 1984, Public Law No. 98-460, was enacted on Octoebr 9, 1984. Section 16 of Public Law No. 98-460 provides the following:

> Sec. 16.(a) Section 205(j) of the Social Security Act is amended by inserting "(1)" after "(j)" and by adding at the end thereof the following new paragraphs:
>
> * * * * *
>
> (3)(A) In any case where payment under this title is made to a person other than the individual entitled to such payment, the Secretary shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments. The Secretary shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.
>
> (B) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a parent or spouse of the individual entitled to such payment who lives in the same household as such individual. The Secretary shall require such parent or spouse to verify on a periodic basis that such parent or spouse continues to live in the same household as such individual.
>
> (C) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a State institution. In such

> cases, the Secretary shall establish a system of accountability monitoring for institutions in each State.
>
> (D) Subparagraph (A) shall not apply in any case where the individual entitled to such payment is a resident of a Federal institution and the other person to whom such payment is made is the institution.
>
> (E) Notwithstanding subparagraphs (A), (B), (C), and (D), the Secretary may require a report at any time from any person receiving payments on behalf of another, if the Secretary has reason to believe that the person receiving such payments is misusing such payments . . .

Section 16(b) of Public Law No. 98-460 amends Section 1631(a)(2) of the Social Security Act by adding the same requirements as those in Section 16(a) for payments made to representative payees under Section 1631(A)(2).[2]

As defendant notes, the amendments in Section 16 differ in two respects from the requirements set out in this Court's orders, *e.g.*, (1) representative payees who are parents or spouses of the beneficiary and who are living in the same household with the beneficiary need only verify the continuation of that living arrangement and are not required to file an annual accounting; and (2) Federal institutions are exempt from accounting.

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[2] Implicit in Congress' exception for spouses and parents who live in the same house is the assumption that a representative payee who is closely related to the beneficiary need not be monitored as closely as others. The Court directs the readers attention to the original complaint in this case in which the named plaintiff, Jeanne Jordan, challenged the propriety of her sister's actions while her sister acted as Jordan's representative payee.

Defendant has not offered any evidence that the due process requirements relied upon by this Court in its prior orders have been satisfied. The Court quite specifically ruled in its March 17, 1983, order that due process required mandatory periodic accounting by payee representatives. While the Court is well aware of the deference usually given Congressional actions, the fact that Congress has enacted some reforms does not change the constitutional requirements. The only way by which the Secretary can avoid the mandatory annual accounting is to establish that beneficiaries' due process rights are being adequately provided through some alternative means. The Court's finding that due process was being provided in the case of institutional beneficiaries was the basis for the Court's allowing the Secretary to waive an accounting by State institutions under certain circumstances. However, no such showing has been made for either of the two categories set out above. Beneficiaries in these two categories have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed.

Defendant should not read this order as an invitation to present further evidence on the two categories of beneficiaries above. The Court is aware that with a case of such magnitude it is difficult to anticipate all questions which may arise in implementing a program such as here prescribed. However, the Secretary has had several chances to present the necessary evidence and has failed to do so. The Court will not indefinitely delay the termination of this case to allow the Secretary to present evidence which could have been presented at least ten months ago.

Accordingly, it is the order of this Court that defendant's Motion For An Indicative Ruling should be and hereby is GRANTED. The Court has determined that it could not grant a Rule 60(b) motion were such motion presented.

IT IS SO ORDERED this 18th day of January, 1985.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2226

JEANNE A. JORDAN, ET AL., PLAINTIFFS-APPELLEES

v.

OTIS T. BOWEN, Secretary of Health and Human Services, DEFENDANT-APPELLANT

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-79-994-W)

[Filed Jan. 5, 1987]

Before HOLLOWAY, Chief Judge, and BALDOCK and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

Under the Social Security Act, a "representative payee" appointed by the Secretary of Health and

Human Services receives benefits for the use of a "beneficiary" unable to manage his or her own affairs. 42 U.S.C. §§ 405(j) and 1383(a)(2). The individual plaintiffs brought the present action in September, 1979, against the Secretary, seeking, *inter alia*, to compel the Secretary to adopt a plan calling for mandatory periodic accounting by such representative payees. There are approximately 5.5 million Title II and Title XVI beneficiaries in representative payment status.

In September, 1980, the district court certified a nationwide plaintiff class consisting of all recipients of Social Security benefits (Title II) and Supplemental Security Income (Title XVI) who then had a representative payee or had such a payee within six years prior to the filing of the action. Discovery ensued, and thereafter the plaintiffs and the defendant filed motions for summary judgment.

On March 17, 1983, the district court ruled against the plaintiffs on all issues raised by the motions for summary judgment except the one that precipitates the present appeal. In this latter regard, the district court held that due process requires mandatory periodic accounting by representative payees and ordered the Secretary to "implement appropriate mandatory periodic accounting procedures within one year from the date of this Order." Both parties appealed from this order. The Secretary later moved to dismiss his appeal, which motion was granted and his appeal was dismissed. The plaintiffs' cross-appeal continued and was later heard by a panel of this Court, which affirmed that portion of the order of the district court which the plaintiffs appealed. Jordan v. Heckler, 744 F.2d 1397 (10th Cir. 1984).

On February 1, 1984, plaintiffs filed a motion to enforce the judgment and order of March 17, 1983.

The Secretary, in the meantime, had developed a proposed accounting program for representative payees, which, in essence, included notification to all representative payees that they must maintain records regarding the use of benefits received and that they might be required to account for the use of these benefits. Further, under the proposed plan, there would be an annual selection of 10 percent of these representative payees for an actual accounting and a follow-up verification for those payees who did not respond to the request for an accounting or those response was inadequate.[1]

The plaintiffs objected to the Secretary's proposed plan, and the district court, after hearing, on March 26, 1984, rejected the proposed plan, holding, *in essence*, that due process required that all representative payees make a periodic accounting. Specifically, the district court ordered the Secretary to take "immediate steps to provide all representative payees with SSA-623 forms and ensure the completion and return of those forms. The defendant is further ordered to implement or maintain reasonable methods of verifying information submitted by representative payees." [2]

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[1] We do not know whether a formal proposed accounting program was actually submitted to the district court. However, the essentials of the program were outlined in documents filed with the district court and included in the record on appeal. As proposed, the plan would have resulted in annual accountings for approximately 550,000 beneficiaries whose payments were made through representative payees.

[2] SSA Form-623 was an initial form designed to be an indicator of representative payee performance. Based on the payee's responses or non-responses, the form could trigger Form SSA-624, which would require more detailed expenditures information and involve a home visit and interviews.

The Secretary filed a notice of appeal from the district court's order of March 26, 1984.[3] That appeal was dismissed by this Court as being premature since a motion under Fed. R. Civ. P. 59 was then pending in the district court. On July 2, 1984, the district court granted the Rule 59 motion and amended its earlier order of March 26, 1984, to the end that the Secretary need not require the completion of form SSA-623 by institutions acting as representative payees for mentally ill and mentally retarded beneficiaries within their institutions, the district court believing that an on-site inspection of such institutions was sufficient.[4] On August 29, 1984, the Secretary again filed a notice of appeal from the district court's order of March 26, 1984, as amended by its order of July 2, 1984. A stay of the district court's order, as amended, was granted by another panel of this Court.

On October 9, 1984, the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, became law. Section 16 of this Act provides for monitoring of all representative payees through, *inter alia*, an accounting program. The statute, however, exempts from the accounting program all representative payees whose beneficiaries are their children or their spouse and who live in the same household as the representative payee. We are advised that the Secretary, while the present appeal

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[3] We express no opinion as to whether the district court's order of March 26, 1984, is a *final* judgment. From the record before us it is difficult to tell.

[4] The district court ordered that institutions acting as representative payees must undergo on-site reviews by the Secretary at least once every three years; further, continual monitoring by district Social Security offices must be provided.

was pending in this Court, filed a motion in the district court for an "Indicative Ruling" and Relief from Judgment, asserting that the new statutory accounting requirements were adequate and thus the district court's earlier order was unnecessary.[5] In connection with that motion, the district court, by order of January 18, 1985, recognized that it had no jurisdiction to *grant* relief from judgment under Fed. R. Civ. P. 60(b) since an appeal was then pending in this Court. However, the district court, citing Aune v. Reynders, 344 F.2d 835 (10th Cir. 1965), "indicated" that it would not grant any relief from judgment on the grounds urged by the Secretary, i.e., the intervening Act of Congress. In thus indicating, the district court opined that the 1984 Act of Congress did not measure up to the requirements of due process, and that due process required some form of mandatory periodic accounting by *all* representative payees, excepting only institutions acting as representative payees.

The present appeal is from the district court's order of March 26, 1984, as amended by its order of July 2, 1984. Appellate procedure requires that an appellant's brief shall contain an argument with appellant's contentions with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. Fed. R. App. P. 28(a)(4). Appellants who fail to argue the issue in their brief are deemed to have waived their contention on appeal. Bledsoe v. Garcia, 742 F.2d 1237, 1244 (10th Cir. 1984).

In this Court, the Secretary makes no attack, as such, on the March 26 order of the district court.

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[5] The motion is not included in the record before us. Hence, we do not know its contents.

In other words, the Secretary in the present appeal makes *no* argument that an annual accounting by 10 percent of the representative payees meets due process. Accordingly, the Secretary has, in a real sense, abandoned any challenge to the order from which the appeal is taken. In such circumstance, the appeal should be dismissed.

However, the Secretary, in the present appeal, attempts to challenge, and vigorously so, the district court's so-called indicative order of January 18, 1985. In this connection, the Secretary argues that the 1984 Act of Congress is constitutional, i.e., it is not violative of due process even though because of its exceptions it does not require mandatory periodic accounting by all representative payees, and that the Act therefore controls. We do not regard that particular matter to be before us in the present appeal.

In its order of January 18, 1985, the district court relied on Aune v. Reynders, 344 F.2d 835 (10th Cir. 1965) as authority for its consideration of the Secretary's motion for relief from judgment. In *Aune*, at page 841, this Court spoke as follows:

> In ordinary civil cases the rule is that after an appeal has been taken the district court retains jurisdiction to consider and deny a Rule 60(b) motion and, if it indicates that it will grant the motion, the movant may then ask the Court of Appeals to remand the case so that the district court may act. If the motion is denied, the movant may appeal from the order of denial.

In its order of January 18, 1985, the district court purported to "grant" the Secretary's motion for an indicative ruling, but, at the same time, the district court also clearly stated that it would *not*

grant the Secretary any relief from the judgment entered on March 26, 1984. Although such does not comport precisely with the language from *Aune* above cited, the effect of the district court's order of January 18, 1985, was, and clearly so, to deny the Secretary any relief from judgment.[6] From our search of the record before us, no appeal was taken by the Secretary from the district court's order of January 18, 1985. Therefore, the correctness of that particular order is not before us by direct appeal and cannot somehow be rejected into the appeal from the district court's order of March 26, 1984.

This appeal is dismissed.

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[6] This Court in *Aune* cited Grecar v. Grecar, 288 F.2d 466 (9th Cir. 1961). In *Grecar*, the Ninth Circuit commented as follows:

> In such circumstances the proper procedure is for appellant to file its rule 60(b) motion in the district court. If that court indicates that it will grant the motion, appellant should then make a motion in this court for a remand of the case in order that the district court may grant such relief, following which a supplemental record showing such proceedings may be filed in this court. Appellant may appeal from an order of the district court denying the rule 60(b) motion, and appellee may appeal from an order of the district court granting such relief, any such appeal to be consolidated with the pending appeals. Citing Binks Mfg. Co. v. Ransburg Electro-Coating Co., 281 F.2d 252, 260-61 (7th Cir. 1960); Ferrell v. Trailmobile, Inc., 223 F.2d 697, 699 (5th Cir. 1955); Smith v. Pollin, 194 F.2d 349-350, (D.C. Cir. 1952).

APPENDIX I

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-1636, 84-1438

JEANNE A. JORDAN, individually, and on behalf of all other persons similarly situated,
PLAINTIFF-APPELLANT

v.

MARGARET M. HECKLER, individually, and in her official capacity as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLEE

JEANNE A. JORDAN, individually, and on behalf of all other persons similarly situated,
PLAINTIFF-APPELLEE

v.

MARGARET M. HECKLER, individually, and in her official capacity as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLANT

Sept. 24, 1984

Rehearing Denied Jan. 22, 1985

in No. 84-1438

Before SETH, Chief Judge, and DOYLE and SEYMOUR, Circuit Judges.

SETH, Chief Judge.

The Social Security Act at 42 U.S.C. § 405(j) provides that benefits under certain circumstances may be paid directly to the applicant or to a representative for the benefit of the applicant. Thus:

> "When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person."

The "certification" is the significant act of the Secretary in this context. Procedures have been established to determine the "need" for a representative and "who" it should be with notice to the claimant.

The trial court concluded that the procedure was adequate under the statute and met due process requirements after making the evaluation under *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, and *Tidwell v. Schweiker*, 677 F.2d 560 (7th Cir.). This issue was considered by this court in *McGrath v. Weinberger*, 541 F.2d 249 (10th Cir.).

Thus, this is the approved procedure for the determination of "need" and who is to act as a representative. The plaintiffs in the trial court contested this issue asserting that more was required. However, they did not pursue their appeal on this issue. Their appeal or cross-appeal is now directed only to claims

that the person selected as a representative as above described has misapplied the funds.

In this context we should first note a significant and basic statutory provision in 42 U.S.C. § 405(k) which relates to the remaining issue of misuse. This subsection reads in part:

> "Any payment made after December 31, 1939, under conditions set forth in subsection (j), any payment made before January 1, 1940, to, or on behalf of, a legally incompetent individual, and any payment made after December 31, 1939, to a legally incompetent individual without knowledge by the Secretary of incompetency prior to certification of payment, if otherwise valid under this title, shall be a complete settlement and satisfaction of any claim, right or interest in and to such payment."

Under the statute the payment to the representative discharges the Secretary from any further obligation "as to such payment." The plaintiffs thus challenge the procedure followed by the Secretary in handling claims made by beneficiaries (or for them) of misuse of funds by the representative certified to receive payment as above described. The plaintiffs urge that under 42 U.S.C. § 405(b) there should be a hearing and review when such a claim of misuse is made. The Secretary's position and the regulations promulgated under § 405(b) is that only actions which prejudice the claimant's rights specifically provided in the Act trigger an administrative hearing and judicial review. These actions are described as "initial determinations" in the regulations. Claims as to a representative's misuse of funds are not within that category under the regulations. *See Califano v. San-*

ders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192. The claimant's right to payments under § 405(j) is established by the certification of payment to the representative.

Under existing procedure the agency examines the objection and makes a decision to request restitution or to take no action. There is no "hearing" on the claim. Again, the Secretary has discharged her duty upon certification and payment. A claim may be the basis for a change in the representative, but this does not have any consequences as to the dollars. There is an adequate remedy for impairment of the free use of benefits. *McGrath v. Weinberger*, 541 F.2d 249 (10th Cir.).

The only action that the agency can take if there appears to be a misapplication of funds by the payee is to "request" restitution and refer the incident to the General Accounting Office. Claims of this nature in this appeal have no relation whatsoever to a termination of benefits or to the dollars from the agency. The claims could however go against the representative as an individual with state law remedies available. The regulations provide procedures for change of representatives. Requests for a change of representative may be made at any time. The trial court on this matter of claims of misuse of funds again made an analysis under *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, and we agree that the circumstances do not warrant the treatment of such claims as an initial determination.

As we have seen, a hearing on claims of misuse would add no statutorily required nor due process procedures. The trial court ordered that the agency require, beginning at a date in the future, periodic accountings by the representatives. The Secretary

apparently has agreed to do this. The accountings would in no way change the legal nature of the proceedings taken on misuse complaints under the Act or as to due process nor add requirements.

We express no opinion as to whether accountings can be required under the Act or for due process reasons.

The judgment of the trial court is affirmed as to its disposition of all issues except the one relating to accountings by representatives which is not considered to be an issue on this appeal.

IT IS SO ORDERED.

84-1438

This is an appeal by the Government (consolidated with No. 83-1636) of an Order which assessed attorney fees against it in the amount of $76,159.20 under the Equal Access to Justice Act (28 U.S.C. § 2412). The suit challenged the procedure whereby representatives are selected to receive payments on behalf of Social Security benefit recipients, whether such representatives should be required to make periodic accountings, and how complaints of misuse of funds should be handled.

The portion of the case which was appealed is set forth above in No. 83-1636, *Jordan v. Heckler*.

In this appeal the Government asserts that the trial court was in error in using, at least in part, 28 U.S.C. § 2412(b) of the Act, and so placing reliance on a common fund or common benefit theory. The Government also challenges the "exceptional success" determination by the trial court as it was applied to decide compensable hours in view of the plaintiffs' success on but one out of the three claims advanced.

The issue whether the several claims were related or unrelated for this purpose is also raised.

We must conclude that the doctrines arising from traditional practice in equity of common fund or common benefit included in 18 U.S.C. § 2412(b) are not applicable to this case. The trial court referred to and used § 2412(b) in its analysis and order. The court in part said: "[J]urisdiction over the subject matter of this suit makes possible an award that will operate to spread the costs proportionately among each of these beneficiaries."

An award of fees against the Secretary does not have such a consequence. If the award is taken from the Social Security Trust Fund it will not in any way reduce the payments to Social Security recipients in representative status. The Trust Fund comes from Social Security taxes on all workers and from general Treasury funds. Is is simply an award against the Government or all persons who pay Social Security taxes and is not related or restricted to those who number some four million.

This situation thus does not resemble the suit against the union in *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, nor the shareholder derivative cases such as *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593, the issue in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184, nor the pension fund in *Kiser v. Huge*, 517 F.2d 1275 (D.C.Cir.).

In *Mills* the court determined that with the fees paid by the corporation, the benefits of the merger suit would be proportionately spread among the shareholders which was the group benefited. In the union case, *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, the benefits under the disclosure act obtained by the action accrued to each union member

and payment out of union funds according to the Court "shift[s] the costs of litigation to 'the class that has benefited . . . .'" Thus the costs are spread among the group members who have benefited and spread in a reasonable and fair manner. The "spreading" of the burden in the case before us was not among the group which was benefited but placed on a much larger group, most of whom had no interest.

Of course, the basic considerations are expressed by the Court in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141, where reference in a note is made to its previous opinions:

> "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting."

There is no way in the case before us that with the fees assessed against the Secretary there was any allocation to those four million recipients with representative payees if they were the parties benefited.

Thus again in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676, the Court said after discussing the common fund cases and the origin of the doctrine:

> "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."

And:

> "Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."

The Court in *Boeing* also refers to the statements in *Alyeska* where shifting of fees was appropriate. Thus where the classes benefited were "small in number and easily identifiable," the "benefits could be traced with some accuracy," where the shifting could be accomplished, "with some exactitude to those benefiting." Thus the fees here considered can properly be assessed only under § 2412(d) which in part provides that the court shall award fees unless it finds that "the position of the United States was substantially justified or that special circumstances make an award unjust." A maximum per hour rate is specified. The fees are to be "reasonable" and based on the "prevailing market rate." The "reasonable" proviso would seem to draw into the consideration of fees the opinions under other statutes wherein the reasonable standard is expressly provided.

As the opinion on the merits indicates, the plaintiffs advanced three claims and they prevailed on one —that representatives should be required to file periodic accountings. The claim for a hearing before a representative was designated and was lost as was a claim for a hearing on claims made against representatives for misuse of funds.

Plaintiffs' success was partial. The trial court determined that plaintiffs were the prevailing parties apparently based on the accounting claim. This appears to be a close question. We cannot say however that the trial court abused its discretion. The Secretary had some years before instituted an accounting requirement although of a limited scope. This was

dropped, according to the record, because of budget limitations. During the same period as the litigation was underway a study was being conducted as to the need for accountings. This study was completed and filed with the court. It concluded that accountings were necessary. The Secretary did not appeal the trial court's order as to accounting, and indicated that it agreed with it. The Secretary asserts in this appeal that she did not oppose *in principle* the accounting claim in the trial court. The trial court's original order was in general terms.

We have considered various aspects of attorney fees claims under several statutes in *Cooper v. Singer*, 719 F.2d 1496 (10th Cir.), *Ramos v. Lamm*, 713 F.2d 546 (10th Cir.), *Gurule v. Wilson*, 635 F.2d 782 (10th Cir.), *Battle v. Anderson*, 614 F.2d 251 (10th Cir.), and in *Francia v. White*, 594 F.2d 778 (10th Cir.), and other cases.

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, shortly before our decision in *Ramos v. Lamm*, laid down the basic considerations. The Court in March of this year in *Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541, 79 L.Ed.2d 891, in a 42 U.S.C. § 1988 claim, set forth most if not all of the basic standards. It also contains a strong message for the simplification of the analysis. *Blum* also describes the assumptions or presumptions now to be applied to the typical elements. For example, the novelty and complexity are "reflected" in the number of hours; the "skill" element and "quality" are reflected in the reasonableness of the rates. The Court also there states that "results" are subsumed in other factors used to calculate a reasonable fee." Further, in *Blum* the Court said: "Nor do we believe that the *number* of persons benefited is a consideration of significance in calculat-

ing fees under § 1988." (Emphasis in original.) Apparently the only element not treated in *Blum* was that of "risk" of loss.

Blum, of course, starts with the position (as in *Hensley*) that the prevailing market rate times reasonable hours should produce a reasonable fee. The inference in *Blum* is that a strong showing is required for a variation.

Blum also for our purposes repeats the "exceptional success" formulation. Thus:

> "In sum, we reiterate what was said in *Hensley*: 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhancement award may be justified.' *Hensley*, [461] U.S., at [435] [103 S.Ct., at 1940]."

We understand the "excellent results" pertain to the entire litigation—considering it as a whole.

The court here decided that the plaintiffs had obtained "excellent results" although they did not prevail on all their claims. We do not know whether we would have arrived at the same conclusion, but we cannot say that the trial court abused its discretion. The trial court made a finding that the Government's position was not substantially justified, and we find no abuse of discretion on this point.

Thus the fees should be computed on all the hours reasonably expended in the litigation by plaintiffs' counsel within the statutory limitation on the hourly rate since no special circumstances have been found to exist. The trial court made no determination.

The case (84-1438) is remanded for a determination of fees as provided herein. IT IS SO ORDERED.

APPENDIX J

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2226

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated,
PLAINTIFF-APPELLEE

vs.

OTIS R. BOWEN, individually and in his official capacity as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLANT

June 19, 1987

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges

The court has for consideration in the captioned case:

1. Appellee's motion to vacate the court's April 16, 1986 order staying orders of the United States Dis-

trict Court for the Western District of Oklahoma pending appeal and appellant's response.

2. Appellant's petition for rehearing and suggestion for rehearing en banc, appellee's memorandum in opposition thereto, and appellant's motion to stay action on the petition for rehearing.

3. Appellant's letter of April 27, 1987, and appellee's motion to strike that letter.

Upon consideration whereof, the hearing panel, consisting of Judges Holloway, McWilliams and Baldock, denies appellee's motion to strike and orders appellant's April 27, 1987 letter docketed and included in the case file.

The hearing panel further denies appellants' motion to stay action on the petition for rehearing and hereby denies the petition for rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Issuance of the mandate on June 29, 1987, pursuant to Fed.R.App.P. 41(a) will automatically terminate the stay entered on April 16, 1986, and will render appellee's motion to vacate the stay moot.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX K

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2226

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated,
PLAINTIFFS-APPELLEES

v.

OTIS T. BOWEN, Secretary of Health and Human Services, DEFENDANT-APPELLANT

April 16, 1986

Before Honorable John P. Moore and Honorable Deanell R. Tacha, Circuit Judges, United States Court of Appeals

This matter is before the court on appellees' motion to dismiss the appeal for lack of jurisdiction and appellant's motion for stay pending appeal.

Upon consideration thereof, it is ordered that the motion to dismiss is denied.

It is further ordered that orders of the United States District Court for the Western District of Oklahoma in case No. CIV 79-994-W entered March 26, 1984, and July 2, 1984, are stayed during the pendency of this appeal. It is further ordered that appellees' answer brief shall be filed and served within thirty days of the date of this order.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX L

STATUTORY PROVISIONS INVOLVED

1. Section 205(j) of the Social Security Act, as amended by Section 16 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1809, and as coidfied at 42 U.S.C. (Supp. III) 405(j), provides:

> Certification for direct or indirect payment; investigation; accountability monitoring; exceptions; reports to Congress
>
> (1) When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.
>
> (2) An certification made under paragraph (1) for payment to a person other than the individual entitled to such payment must be made on the basis of an investigation, carried out either prior to such certification or within forty-five days after such certification, and on the basis of adequate evidence that such certification is in the interest of the individual entitled to such payment (as determined by the Secretary in regulations). The Secretary shall ensure that such certifications are adequately reviewed.
>
> (3)(A) In any case where payment under this subchapter is made to a person other than the individual entitled to such payment, the Sec-

retary shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments. The Secretary shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.

(B) Subpargraph (A) shall not apply in any case where the other person to whom such payment is made is a parent or spouse of the individual entitled to such payment who lives in the same household as such individual. The Secretary shall require such parent or spouse to verify on a periodic basis that such parent or spouse continues to live in the same household as such individual.

(C) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a State institution. In such cases, the Secretary shall establish a system of accountability monitoring for institutions in each State.

(D) Subparagraph (A) shall not apply in any case where the individual entitled to such payment is a resident of a Federal institution and the other person to whom such payment is made is the institution.

(E) Notwithstanding subparagraphs (A), (B), (C), and (D), the Secretary may require a report at any time from any person receiving payments on behalf of another, if the Secretary has reason to believe that the person receiving such payments is misusing such payments.

(4)(A) The Secretary shall make an initial report to each House of the Congress on the im-

plementation of paragraphs (2) and (3) within 270 days after October 9, 1984.

(B) The Secretary shall include as a part of the annual report required under section 904 of this title, information with respect to the implementation of paragraphs (2) and (3), including the number of cases in which the payee was changed, the number of cases discovered where there has been a misuse of funds, how any such cases were dealt with by the Secretary, the final disposition of such cases, including any criminal penalties imposed, and such other information as the Secretary determines to be appropriate.

2. Section 1631(a)(2) of the Social Security Act, as amended by Section 16 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1809-1810, and codified at 42 U.S.C. (Supp. III) 1383(a)(2), provides:

§ 1383. Procedure for payment of benefits

(a) Time, manner, form, and duration of payments; promulgation of regulations

* * * * *

(2)(A) Payments of the benefit of any individual may be made to any such individual or to his eligible spouse (if any) or partly to each, or, if the Secretary deems it appropriate to any other person (including an appropriate public or private agency) who is interested in or concerned with the welfare of such individual (or spouse). Notwithstanding the provisions of the preceding sentence, in the case of any individual or eligible spouse referred to in section 1382(e)(3)(A) of this title, the Secretary shall provide for making payments of the benefit to any other person (in-

cluding an appropriate public or private agency) who is interested in or concerned with the welfare of such individual (or spouse).

(B) Any determination made under subparagraph (A) that payment should be made to a person other than the individual or spouse entitled to such payment must be made on the basis of an investigation, carried out either prior to such determination or within forty-five days after such determination, and on the basis of adequate evidence that such determination is in the interest of the individual or spouse entitled to such payment (as determined by the Secretary in regulations). The Secretary shall ensure that such determinations are adequately reviewed.

(C) (i) In any case where payment is made under this subchapter to a person other than the individual or spouse entitled to such payment, the Secretary shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments. The Secretary shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.

(ii) Clause (i) shall not apply in any case where the other person to whom such payment is made is a parent or spouse of the individual entitled to such payment who lives in the same household as such individual. The Secretary shall require such parent or spouse to verify on a periodic basis that such parent or spouse continues to live in the same household as such individual.

(iii) Clause (i) shall not apply in any case where the other person to whom such payment is made is a State institution. In such cases, the Secretary shall establish a system of accountability monitoring for institutions in each State.

(iv) Clause (i) shall not apply in any case where the individual entitled to such payment is a resident of a Federal institution and the other person to whom such payment is made is the institution.

(v) Notwithstanding clauses (i), (ii), (iii), and (iv), the Secretary may require a report at any time from any person receiving payments on behalf of another, if the Secretary has reason to believe that the person receiving such payments is misusing such payments.

(D) The Secretary shall make an initial report to each House of the Congress on the implementation of subparagraphs (B) and (C) within 270 days after October 9, 1984. The Secretary shall include in the annual report required under section 904 of this title, information with respect to the implementation of subparagraphs (B) and (C), including the same factors as are required to be included in the Secretary's report under section 405(j)(4)(B) of this title.

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